United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL 74-2440

B

United States Court of Appeals

For the Second Circuit.

P/S

In the Matter of

ALPHONSE GUARIGLIA,

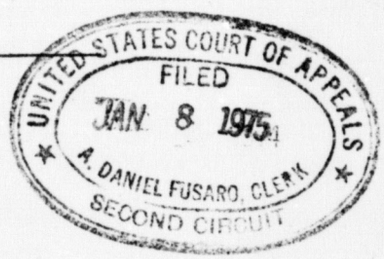
Bankrupt, Appellee,

v.

COMMUNITY NATIONAL BANK AND TRUST COMPANY,
Creditor, Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

APPELLANT'S APPENDIX



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BARTELS, J.

NAME OF BANKRUPT	DIST. NO.	DIV NO.	DOCKET NO.
GUARIGLIA, Alphonse (Last, First, Middle)	207	1	73-B-141

S.S.#13-2584072

ADDRESS OF BANKRUPT/DEBTOR (Number and Street)

1676 - 83rd Street,

CITY	ZONE	COUNTY	STATE
BROOKLYN		KINGS	N.Y.

CHAPTER OR SECTION

DATE PETITION FILED: 2/7/73

DATE CLOSED

DISCHARGE: Granted / Denied / Waived or not applied for

DATE DISCHARGED

CHECK IF: [X] Voluntary; Involuntary; Fee paid in installments; Corporation

OCCUPATION (Check one): Farmer; [X] Employee; Professional; Other (Non-business); Merchant; Manufacturer; Other (Business)

PETITION DISMISSED? ☐ YES | DATE DISMISSED | CHAPTER UNDER WHICH CASE WAS PENDING WHEN DISMISSED

NAME OF JUDGE

NAME OF REFEREE: MANUEL J. PRICE

NO ASSET CASES ONLY CLAIMS AS SCHEDULED	TOTAL	PRIORITY	SECURED	UNSECURED
	$	$	$	$

	NAMES AND ADDRESSES
ATTORNEY FOR BANKRUPT OR DEBTOR	JOSEPH L. BELVEDERE, (212-871-1600) 4518 - 11th Ave., Brooklyn, N.Y., 11219
ATTORNEY FOR PETITIONING CREDITORS	
RECEIVER	
ATTORNEY FOR RECEIVER	
TRUSTEE	
ATTORNEY FOR TRUSTEE	

CHANGES OF PRINCIPALS

DATE	PROCEEDINGS
2/7/73	Petition, Schedules and Statement of Affairs filed. (1) Referred to Manuel J. Price, Referee. (orig. & copy sent to Ref. Price - 2/7/73)
6/28/73	Copy of Amended Schedule A-3 received from Referee's office and filed. (2)
4/3/74	Notice of Appeal to District Court which was filed with Price, Bk.J., to review order of Price ,J. dated 2/27/74 received and filed. ASSIGNED TO: BARTELS, J. (3)
4/10/74	Letter from Reuben E. Gross, Esq., addressed to the Legal Aid Society together with Memo from Reuben E. Gross, Atty.

FORM BK-74-D
SEP. 1962 (7-70)

UNITED STATES DISTRICT COURTS

[X] CHECK THIS BOX IF FILING FEES WERE PAID IN FULL AT TIME OF FILING

BANKRUPTCY DOCKET — COPY

filed stating that appeal will be heard Before the Hon. John Bartels on May 17, 1974, at 10:00 A.M.Courtroom #4, 225 Cadman Plaza East, Brooklyn, N.Y., (4)

5/8/74 Bankrupt- Appellee's Brief filed.((Kalman Finkel,Legal Aid Society) (5)

8/2/74 Before BARTELS,J.- Case called- Hearing on appeal from Referees decision ordered and befun-Hearing concluded- Decision reserved.

9/30/74 By Bartels,J. Decision rendered. re: Appeal of Community Natiknal Bank & Trust Co.from order of Judge restraining it from proceeding further to compel bankrupt to comply with an order of Civil Court of City of N.Y., Richmond County, punishing him for contempte,etc.
The order of the bankruptcy court is hereby affirmed.
SO ORDERED. (6)

10/29/74 Notice of Appeal filed (from above order by Bartels,J.) copy mailed to U.S.C.C.A.
(Reuben E. Groas, Esq.) (7)

11/12/74 Order of U.S.C.C.A, dated 11/7/74, filed that the record on appeal be filed on or before 11/25/74. Appellant's brief & the joint appendix be filed on or before 12/6/74. Brief of appellee.
Argument on appeal to be heard on week of Jan. 20, 1975. (8)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

In the Matter of :

ALPHONSE GUARIGLIA, :

Bankrupt-Appellee, :

73-B-141

-against- :

COMMUNITY NATIONAL BANK & TRUST COMPANY, :

Creditor-Appellant. :

----------x

Appearances:

KALMAN FINKEL, ESQ.
The Legal Aid Society
by JOHN E. KIRKLIN, ESQ.
ELAINE C. BUCK, ESQ.
The Legal Aid Society
Civil Appeals Bureau
267 West 17th Street
New York, N.Y. 10011
Attorneys for Appellee
JOAN MANGONES, ESQ.
Of Counsel

REUBEN E. GROSS, ESQ.
30 Bay Street
Staten Island, N.Y. 10301
Attorney for Appellant

BARTELS, D.J.

Community National Bank and Trust Company ("Bank") appeals from an order of a bankruptcy judge restraining the

Bank as a creditor from proceeding further to compel the bankrupt, Alphonse Guariglia, to comply with an order issued by the Civil Court of the City of New York, County of Richmond, punishing him for contempt of court by imposing a fine of $4,755 together with $50 costs. In May, 1969, the Bank obtained a judgment in the Civil Court against Guariglia for the same amount. The Bank sat on its rights for three years and on October 28, 1972, served on Alphonse Guariglia and his wife an information subpoena pursuant to 7B N.Y.C.P.L.R. §5223, requiring them to answer interrogatories regarding their assets as part of the Bank's effort to enforce the judgment. Neither responded to the subpoena. On November 28, 1972, the Bank served an order to show cause upon Guariglia as to why he should not be held in contempt, returnable December 22, 1972. Again Guariglia did not appear but instead took the order to his attorney. On December 29, 1972, a bailable attachment was issued by the Civil Court.

At this point Guariglia's attorney agreed to an examination of the bankrupt and his wife, to take place on February 15, 1973, upon the understanding that Guariglia's attorney would not be present and that the transcript would not be signed until the attorney had a chance to read the

same. In the meantime, however, on February 7, 1973, Guariglia's attorney filed a petition in bankruptcy in this Court, which listed the debt to the Bank as a liability. Two days later a notice was sent to all creditors, including the Bank, fixing February 22, 1973, as the date for the first creditors' meeting, and April 11, 1973 was set as the last day to file objections to the bankrupt's discharge and applications to determine the dischargeability of debts claimed to be non-dischargeable pursuant to clauses (2), (4) or (8) of Section 17a of the Bankruptcy Act, 11 U.S.C. §35a (2), (4) or (8).

On February 15, 1973, the bankrupt and his wife appeared at the office of the Bank's attorney and were examined as to their assets, but the transcript was not signed because the bankrupt's attorney was not at the examination and had not had an opportunity to examine the transcript. It was signed by the bankrupt on April 9, 1973 and returned on April 10, 1973, the day before the last day fixed for filing objections to the bankrupt's discharge and applications to declare debts non-dischargeable. In the interim the first meeting of creditors was held on February 22, 1973. No creditors appeared at such meeting and a

trustee was appointed. Thereafter, on May 22, 1973, the bankrupt made a motion to amend the schedule of creditors previously filed and to add another creditor's name which had been inadvertently omitted. The motion was granted and the time to file objections was extended to July 16, 1973. No objections to discharge were ever filed by the Bank.

After receiving the signed transcript of the bankrupt's examination, counsel for the Bank moved for an order adjudging the bankrupt in contempt pursuant to 7B N.Y.C.P.L.R. §5251, and fining him the amount of the judgment, $4,755. Over the opposition of the bankrupt, however, the Civil Court Judge on June 19, 1973, found the bankrupt in contempt, fined him in the amount of $4,755 plus $50 costs, and directed that the same be paid to the Bank in $20 weekly installments. Upon the bankrupt's application, the bankruptcy judge issued an injunction from which the Bank now appeals.

Two issues are presented by this appeal: (1) whether the bankruptcy court has the power to enjoin the prosecution of a contempt order of a state court, and (2) assuming jurisdiction, whether the bankruptcy court should exercise that jurisdiction upon the facts of this case. It is hardly necessary to observe that the power of the federal courts to

enjoin state court proceedings is severely restricted except in the field of bankruptcy. Authorities for this proposition are manifold. Section 11a of the Bankruptcy Act (11 U.S.C. §29(a)) provides that a suit founded upon a claim from which a discharge would be a release "shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, ..." Section 2a of the Act (11 U.S.C. §11(a)) specifically invests courts of bankruptcy "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, ..." Thus, courts of bankruptcy are courts of equity and as such have ancillary jurisdiction to effectuate and enforce their judgments of adjudication of bankruptcy and of discharge of bankruptcy debts. Pepper v. Litton, 308 U.S. 295, 303-4 (1939). In Local Loan Co. v. Hunt, 292 U.S. 234, 241 (1934), the Supreme Court affirmed a decision of the bankruptcy court enjoining the enforcement in the state court of an assignment of future earnings by the bankrupt. In discussing jurisdiction the Supreme Court said:

> "What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith. It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist."

Therefore, there can be no doubt that the bankruptcy court has authority to entertain the present application to stay the state court action.

The second question is whether there exists here such "unusual circumstances" which would justify the exercise of the Court's power to stay. There are a number of authorities which hold that if the contempt proceeding is a step to collect a judgment, then it should be stayed, the test being whether the fine was imposed by the state court to uphold its dignity or whether in effect it was a circumvented method of collecting a judgment against the debtor otherwise dischargeable in bankruptcy. If the proceeding in reality is one to punish the debtor for contumacious conduct against the dignity of either the state or federal court, the bankruptcy court should not raise its hand to stay the proceeding. In Re Bell, 53 F.Supp. 993 (E.D.N.Y. 1943); In Re

McRoberts, 17 F.Supp. 82 (W.D.N.Y. 1936); In Re Thomashefsky, 51 F.2d 1040 (2d Cir.1931); Matter of Metz, 6 F.2d 962 (2d Cir. 1925); In Re Hall, 170 F. 721 (S.D.N.Y. 1909); 2 Remington on Bankruptcy 22 et seq., §§561-562.

On the other hand, if the contempt is not a contempt for which courts ordinarily punish an o on their own motion but is in fact a method of collecting a debt upon the application of a creditor, then the so-called contempt is suspect and may in reality be nothing more than a label to assist the creditor. In In Re Spagat, 4 F.Supp. 926 (S.D. N.Y. 1933), Judge Paterson observed that the fact that the fine imposed was to be paid to the creditor who initiated the contempt was irrelevant since this was a matter to be left solely to the discretion of the court. The fact that the fine imposed is to be paid to the creditor does not necessarily mean that there has been no contempt, even though the punishment is in aid of the creditor. No problem ensues if there is no bankruptcy. But when that fine is in the amount of the debt to be paid to a creditor by a debtor in bankruptcy, the contempt then becomes a method of according the creditor a preference by the collection of a provable debt dischargeable in bankruptcy. The more realistic and

discriminating approach to the question seems to be that adopted by Judge Magruder in Parker v. United States, 153 F.2d 66 (1st Cir. 1946), where he said:

> "But there would seem to be no a priori reason why liability for a compensatory fine imposed in a civil contempt proceeding should not be deemed a 'debt' within the meaning of § 1(14) of the Bankruptcy Act, and a provable debt under § 63, 11 U.S.C.A. § 103. ... (p. 71)
>
> ...
>
> "As we have already seen, the compensatory fine is not properly to be regarded as a penalty levied by the court for a contumacious act." (p. 72.)

To the same effect are In re Leonoble, 79 F.Supp. 457, 458 (S.D.N.Y. 1948); In re Fortunato, 123 F. 622 (S.D.N.Y. 1903); and Matter of Adler, 144 F. 659 (2d Cir.), cert. denied, 201 U.S. 647 (1906). The contempt here involved was not a criminal contempt, nor did the order require the fine to be paid into court. The fine imposed equalled the amount of the judgment plus $50 costs payable to the judgment creditor. Labelling the order as a contempt proceeding does not change its character as a provable debt under the Bankruptcy Act. Here there are present unusual circumstances, justifying the exercise by the bankruptcy court of its inherent equity

powers to restrain the enforcement of the state court contempt order to collect a judgment which is compensatory in nature constituting no defense against the dignity of the court.

The order of the bankruptcy court is hereby affirmed.

SO ORDERED.

Dated: Brooklyn, N.Y.,
September 30, 1974.

United States District Judge

ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

In the Matter of :

ALPHONSE GUARIGLIA, : Index No. 73 B 141

Bankrupt, : ORDER TO SHOW CAUSE

-against- :

COMMUNITY NATIONAL BANK & TRUST CO., :

Creditor. :

----------X

Upon the annexed Application for Restraining Order of ALPHONSE GUARIGLIA, dated on the 3rd day of July, 1973, and upon all other papers and proceedings heretofore had herein, it is

ORDERED, that Respondent show cause before this Court, at a Motion Term thereof to be held in Room 340 of the United States District Courthouse at 225 Cadman Plaza East, Brooklyn, New York on the 18th day of July, 1973 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered granting a Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, restraining and enjoining Respondent from requiring Applicant Petitioner to comply with the Order Imposing Fine for Contempt of the Civil Court of the City of New York, County of Richmond, dated June 19, 1973, Index No. 375/69, and for such other and further relief as

to this Court may seem just and proper; and it is further

ORDERED, that Respondent, its agents, servants and employees be, and they hereby are restrained and enjoined from ordering or otherwise causing or compelling Applicant Petitioner to comply with the said Order Imposing Fine for Contempt pending a hearing and determination of this Order to Show Cause. This stay shall not affect any order or action by the State Court; and it is further

ORDERED that service of a copy of this Order together with a copy of the papers upon which it was granted, upon the Respondent or the attorney for the Respondent on or before the 10th day of July, 1973, at 10:30 o'clock, be good and sufficient service.

Dated: Brooklyn, New York
July 5, 1973
10:30 A.M.

S/ Joseph V. Costa
Referee in Bankruptcy, Acting
for Manuel J. Price, Referee
in Bankruptcy

APPLICATION FOR RESTRAINING ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

In the Matter of	:	Index No. 73 B 141
ALPHONSE GUARIGLIA,	:	APPLICATION FOR RESTRAINING ORDER
Bankrupt,	:	
-against-	:	
COMMUNITY NATIONAL BANK & TRUST CO.,	:	
Creditor.	:	

----------X

TO: THE HONORABLE JOSEPH V. COSTA, REFEREE IN BANKRUPTCY

The Application of ALPHONSE GUARIGLIA, respectfully shows:

1. On February 7, 1973, I filed my petition in bankruptcy and was adjudicated bankrupt thereon.

2. On May 22, 1973, by Motion, I was permitted to amend Schedule A-3 of my Petition in Bankruptcy to add Bank Americard as a debtor.

3. July 15, 1973 was fixed as the last day for filing objections to the bankruptcy charge and for filing applications as provided in Section 17c (2) of the Bankruptcy Act, to determine the dischargeability of debts claimed to be non-dischargeable pursuant to clauses (2), (4) or (8) of Section 17a of the Bankruptcy Act.

4. The debt to the Respondent, Community National Bank & Trust Co., was listed in Schedule A-3 of the original Petition.

5. An Order Imposing Fine was entered on June 19, 1973 by the Civil Court of the City of New York, County of Richmond, Index No. 375/69 in the action entitled"Matter of the Community National Bank & Trust Co., Judgment Creditor, vs. Alphonse Guariglia, et ano., Judgment Debtor", imposing a fine for the exact amount of the judgment, to wit Four Thousand Seven Hundred and Fifty-Five ($4,755.00) Dollars, and costs in the amount of Fifty ($50.00) Dollars, allegedly on the ground that I wilfully disobeyed a subpoena dated September 15, 1972. The total fine equals Four Thousand Eight Hundred Five ($4,805.00) Dollars and it is ordered that I pay said sum to the Judgment Creditor at the office of its attorney, Reuben E. Gross, Esq., in weekly installments of Twenty ($20.00) Dollars, commencing on June 20, 1973. (EXHIBIT A.)

6. The facts are that I did not disobey a subpoena but, that I made myself available to Reuben E. Gross, Esq., attorney for the Respondent, and appeared in person, for an examination at his office at 30 Bay Street, Staten Island, New York 10301, on February 15, 1973, at 11:00 a.m. where I answered all of the questions put to me. Subsequently, I signed the transcript of the examination and Joseph L. Belvedere, Esq., one of the two attorneys representing me in my petition for bankruptcy, mailed it back to Mr. Gross.

7. The debt to the Respondent is listed on Schedule

A-3 of my petition in bankruptcy and the Respondent has had an opportunity to object to its discharge at the first meeting of creditors, but the Respondent did not avail itself of that opportunity.

8. The respondent can still object to the discharge of said debt if it so desires.

9. The respondent, by this maneuver in a State court in obtaining an Order Imposing Fine for Contempt and having the fine imposed in an amount equal to the judgment, to wit: Four Thousand Seven Hundred Fifty-five ($4,755.00) and court costs in the amount of Fifty ($50.00) Dollars is attempting to circumvent the letter and spirit of the Bankruptcy Act, and to defeat and nullify the effects of the rights and privileges offered to the Application/Petitioner by the Bankruptcy Act.

10. The Civil Court of the City of New York, County of Richmond had no jurisdiction in this matter once the Applicant/Petitioner was adjudged a bankrupt and had no jurisdiction to impose a fine during the pendency of my bankruptcy proceeding.

11. That the Order Imposing Fine for Contempt orders "that upon failure of said Judgment Debtor to pay said fine or any installment thereof, as aforesaid, the entire balance shall immediately fall due and an order for his commitment may issue on three days' notice to be served upon

the debtor personally or by registered or certified mail, said order to be directed to the Sheriff of the City of New York and commanding him to arrest the said Judgment Debtor without further process and commit him to the civil jail of said county and hold him in close custody until he shall pay said fine or is discharged according to law." (EXHIBIT A.)

12. Unless restraint is issued the respondent will cause the Sheriff of the City of New York to arrest me thereby causing me irreparable injury and detriment.

WHEREFORE, Applicant/Petitioner prays that:

(1) The respondent be restrained in person or by any employees, agents or attorneys from taking any further steps in the prosecution of that certain action in the Civil Court of the City of New York, Richmond County, entitled "In the Matter of Community National Bank and Trust Company, Judgment Creditor vs. Alphonse Guariglia et ano, Judgment Debtor" Index No. 375/69.

(2) The respondent be restrained in person or by any employees, agents or attorneys from taking any steps to put into effect the Order Imposing Fine for Contempt.

(3) The respondent be restrained in person or by any employees, agents or attorneys from taking any steps to collect any money in installments or otherwise.

(4) The respondent be restrained in person or by any employees, agents or attorneys from directing the Sheriff of the

APPLICATION FOR RESTRAINING ORDER

City of New York to arrest me and to commit me to civil jail.

S/
ALPHONSE GUARIGLIA

Sworn to before me this
3rd day of July, 1973.

S/
ALLAN SCHWAB
Notary Public, State of New York
No. 31-3546675
Qualified in New York County
Commission Expires March 30, 1975

STATE OF NEW YORK)
COUNTY OF RICHMOND) SS:

ALPHONSE GUARIGLIA, being duly sworn, deposes and says that he is the Applicant/Petitioner in the within entitled action; that he has read the foregoing Application and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

S/
ALPHONSE GUARIGLIA

Sworn to before me this
3rd day of July, 1973.

S/
ALLAN SCHWAB
Notary Public, State of New York
No. 31-3546675
Qualified in New York County
Commission Expires March 30, 1975

ORDER IMPOSING FINE FOR CONTEMPT

At a Special Term, Part II, of the Civil Court of the City of New York held in the County of Richmond on the 19th day of June, 1973.

P R E S E N T:

HON. JEROME O. ELLIS, Judge

----------X

In the Matter of :

COMMUNITY NATIONAL BANK & TRUST CO. : Index No. 375/69

Judgment Creditor, : ORDER IMPOSING FINE FOR CONTEMPT

-vs- :

ALPHONSE GUARIGLIA et ano, :

Judgment Debtor. :

----------X

The above named Judgment Debtor having been produced pursuant to bailable attachment and the motion to punish for contempt having been heard, and after hearing Reuben E. Gross, Esq., attorney for the Judgment Creditor, in support of said motion, and after hearing the Judgment Debtor appearing by Abraham Fleischmann, Esq., in opposition thereto, and AFTER READING AND FILING the affirmation of Reuben E. Gross, dated May 3, 1973 with exhibits annexed in support thereof; and the affidavit of Joseph L. Belvedere, sworn to May 16, 1973 and Alphonse Guariglia sworn to May 16, 1973,

NOW, on motion of counsel for the Judgment Creditor, it is Ordered that this motion to punish the Judgment Debtor for contempt of court is granted, and it is adjudged

that the said Debtor is guilty of contempt of court having willfully disobeyed the subpoena dated the 15th day of September, 1972, heretofore personally served upon him in that he failed to satisfactorily excuse or explain said contempt, and it is

ADJUDGED that plaintiff was actually damaged in the sum of $4755.00; that said misconduct of the Judgment Debtor was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of said Judgment Creditor, and it is ordered that the said Judgment Debtor is fined for said contempt the sum of $4,755.00 and $50.00 costs, and $ for sheriff's fees, making a total fine of $4,805.00, to be paid to the Judgment Creditor at the office of the attorney for the Judgment Creditor, Reuben E. Gross, Esq., at 30 Bay St., Staten Island, N.Y. in weekly installments of $20.00 commencing on June 20, 1973. The fine when paid, exclusive of costs and disbursements, shall be applied in reduction of the judgment, and it is

ORDERED, that upon failure of said Judgment Debtor to pay said fine or any installment thereof, as aforesaid, the entire balance shall immediately fall due and an order for his commitment may issue on three days' notice to be served upon the debtor personally or by registered or certified mail, said order to be directed to the Sheriff of the

ORDER IMPOSING FINE FOR CONTEMPT

City of New York and commanding him to arrest the said Judgment Debtor without further process and commit him to the civil jail of said county and hold him in close custody until he shall pay said fine or is discharges according to law.

E N T E R:

S/
JEROME OTIS ELLIS
Judge of the Civil Court
of the City of New York

Receipt of a copy of this Order
is duly acknowledged by the Judgment Debtor.

I, REUBEN E. GROSS, an attorney at law, do hereby certify pursuant to Sec. 210B CPLR, that I have compared the foregoing with the original and have found it to be a true and complete copy.

Dated: 6/19/73

S/
REUBEN E. GROSS

EXHIBIT "A"

MR. GROSS: In the Bankruptcy Court, yes.

AFFIDAVIT IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

In the Matter of :

ALPHONSE GUARICLIA, : Index No. 73 B 141

Bankrupt, : AFFIDAVIT

-against- :

COMMUNITY NATIONAL BANK & TRUST CO., :

Creditor. :

----------X

STATE OF NEW YORK)
COUNTY OF RICHMOND) SS:

REUBEN E. GROSS, being duly sworn, deposes and says:

I am attorney for the creditor, Community National Bank & Trust Co. and make this affidavit in opposition to bankrupt's motion for a stay of a state court order.

The bankrupt's moving papers show that he was fined for contempt of court in violating a subpoena dated September 15, 1972. Said subpoena was served on the debtor on October 28, 1972. Two orders to show cause were issued, the last one on November 28, 1972 which was duly served upon him requiring his appearance at the Civil Court on December 22, 1972. Upon his non-appearance a bailable attachment was issued on December 29, 1972, of which a copy is annexed.

All said proceedings predated the adjudication of bankruptcy on February 7, 1973 (paragraph 1 of bankrupt's

affidavit dated July 3, 1973).

Accordingly, it is respectfully submitted that this Court is without jurisdiction to review said contempt. Liberty Distributors, Inc. v. West Hempstead Nursery & Garden Center, Inc., 58 Misc. 2d 240, aff'd. 62 Misc. 2d 905. Re: Bell, 53 Fed. Supp. 993. Re: Koransky, 170 Fed. 712. Re: Morris Plan, 164 Misc. 712. Re: Rosevine Realty v. Stich, 164 Misc. 339. S S & B Live Poultry Corp. v. Fleischer, 165 Misc. 175.

WHEREFORE, deponent respectfully prays that this motion be denied.

S/
REUBEN E. GROSS

Sworn to before me this
11th day of September, 1973

S/
Notary Public

AVERY J. GROSS
Notary Public, State of New York
No. 43-1583910
Qualified in Richmond County
Commission expires March 30, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

In the Matter :

of :

ALPHONSE GUARIGLIA : 73 B 141

Bankrupt :

----------x

United States Courthouse
Brooklyn, New York

September 13, 1973
10:30 a.m.

B e f o r e

HON. MANUEL J. PRICE

Referee in Bankruptcy

RONALD E. TOLKIN
Official Court Reporter

Appearances:

ALAN SCHWAB, Esq.
Staten Island Legal Aid
56 Bay Street
Staten Island, N.Y. 10301
By: JOAN MANGONES, Esq., of counsel

REUBEN E. GROSS, Esq.
Attorney for Community National Bank
30 Bay Street
Staten Island, N.Y.

THE COURT: Alphonse Guariglia.

MS. MANGONES: Your Honor, I have been replaced in this case. Originally Mr. Belvedere was the attorney for the bankrupt, and I do have a substitution of attorney, which I would like to submit at this time.

THE COURT: You may file it at any time. It really isn't necessary that you hand it to me.

MS. MANGONES: Here it is, your Honor.

Now, it would appear that on February the 7th the schedules were submitted in this case of the bankrupt. I don't have the schedules, but --

THE COURT: Let me get them. You mean the petition was filed?

MS. MANGONES: The petition was filed on

February 7th, 1973.

(Documents handed to Ms. Mangones)

MS. MANGONES: All right. Fine. Now I can proceed from there.

The chronology appears to be this: A judgment was had by the Community National Bank against Alphonse Guariglia in the Civil Court of Richmond County, Index No. 375/69. The judgment was for $4,755.

THE COURT: When was the judgment obtained?

MS. MANGONES: I don't know when that was obtained, your Honor.

Now, it appears that the bankrupt was served with a subpoena, an information subpoena, a supplementary subpoena, to get information.

THE COURT: When was it returnable?

MS. MANGONES: I don't know, but the bankrupt claims that he was never served with it, nevertheless, according to the affidavit in opposition it seems that two orders to show cause followed this, and --

THE COURT: You mean two orders to show cause to punish for contempt?

MS. MANGONES: Right. -- followed it, and

the bankrupt was supposed to appear in court on December 22, 1972 -- that's in the Civil Court of Richmond County -- and there was a default. He did not appear.

THE COURT: On the motion to punish for contempt?

MS. MANGONES: On the motion to punish for contempt.

Is that correct, Mr. Gross?

MR. GROSS: That is correct.

MS. MANGONES: So he did not appear.

Then the bankruptcy was entered on February 7th. It then appears that there was a conversation between Mr. Gross and Mr. Belvedere, who was then Mr. Guariglia's attorney, and date was set for the examination of the bankrupt.

The bankrupt was examined on February 15th, in Mr. Gross's office, at 11:00 o'clock in the morning.

Now, what went on from there until the order imposing a fine for contempt I don't know, but at any rate, we have an order imposing a fine for contempt, and it is stated here that both parties were represented by their attorneys and a hearing was

held, and as a result of the hearing an order of contempt was set, and the order of contempt was set in the amount of -- the fine was set in the amount of --

THE COURT: In the nature of a bailable attachment. I assume the bankrupt was brought in on what used to be the old bailable attachment.

MR. GROSS: Well, we didn't have to actually go that far.

THE COURT: All right, let me hear Miss Mangones.

MS. MANGONES: All right. Now, we then came into this court because we feel that this man, who answered the questions, who submitted himself to an examination, has, in effect, given --

THE COURT: Purged himself of the contempt?

MS. MANGONES: -- has purged himself of any contempt. The bank --

THE COURT: Except that he evidently wasn't able to convince the Civil Court judge that he had.

MS. MANGONES: It appears on face that he didn't.

THE COURT: Evidently there was an appearance.

MS. MANGONES: There was an appearance.

THE COURT: There was evidently an appearance, a hearing, and he was represented by counsel.

MS. MANGONES: He was represented by counsel except that Mr. Belvedere tells me that he was unable to go to the hearing on that day and he sent his colleague, Mr. Fleischman, to represent him, but Mr. Fleischman was severely ill on that day, and --

THE COURT: And he didn't go either?

MS. MANGONES: He did, but when he left the hearing he had a heart attack. So Mr. Belvedere feels --

THE COURT: A whole series of disasters.

MS. MANGONES: -- so Mr. Belvedere feels that perhaps he didn't do a good job --

THE COURT: Perhaps there wasn't an adequate representation?

MS. MANGONES: Right.

THE COURT: There must have been a record taken. There must have been a record taken in the Civil Court.

MS. MANGONES: We don't dispute that, your Honor.

THE COURT: So that there must have been

something before the judge in the Civil Court which impelled him to fix a fine. Mr. Gross has cited some of the cases which preclude me from looking behind a contempt in the Civil Court. I am familiar with, I think the West Hempstead case. As a matter of fact, I think that was the subject of a motion before me in which I upheld the contempt. I think the individual who was the principal of the West Hempstead corporation filed a voluntary petition in bankruptcy, and I upheld the contempt in that situation.

Unfortunately, it seems that there have been a series of disasters for this bankrupt.

MS. MANGONES: Well, what makes us give some thought to this matter is that the bank could have come in at the bankruptcy proceeding and placed its claim here.

THE COURT: Except that -- and I'm not answering for Mr. Gross -- they proceeded with a much more drastic remedy, the motion to punish for contempt, and there was no stay in this court, and there could be no stay of a contempt proceeding in another court.

MS. MANGONES: Well, if this court has

jurisdiction of the bankruptcy proceeding, should it not perhaps have preference and insist that the creditor place its claim in your court rather than go into the State Court, because this seems like a maneuver to --

THE COURT: To circumvent?

MS. MANGONES: -- to circumvent the bankruptcy laws.

THE COURT: Well, if you recall, any orders that I sign -- any stay orders that I sign -- provide that they shall not stay any proceedings to punish for contempt in any other courts.

I think that the cases hold -- I don't remember what the exact language of the case is -- I'll get my decision in that West Hempstead case. I don't remember the statement, but it's to uphold the dignity. I think the language indicates that the purpose is to uphold the dignity of the court issuing the original order.

MR. GROSS: The Crowninshield case.

THE COURT: I'm talking about the decision that I wrote some time ago.

Let me hear Mr. Gross, and I'd like you to -- Have you read the cases cited by Mr. Gross?

MS. MANGONES: Yes, I have.

THE COURT: What is your comment?

MS. MANGONES: I have no quarrel with the law and with the cases. I have no quarrel with it. My quarrel is that if this court assumes jurisdiction, and it had jurisdiction, before the fine was obtained, did not the creditor have the duty to come into this court and place its claim here --

THE COURT: It wasn't stayed. There is no automatic stay. And counsel for the bankrupt never applied for a stay. Did he?

MS. MANGONES: Not to my knowledge.

THE COURT: My file doesn't show that there was any application for a stay.

The only application for a stay was I think in your order to show cause that was submitted by you.

MS. MANGONES: In my -- Yes.

THE COURT: But there wasn't any.

MS. MANGONES: No, not that I know of. Unless you have it. He didn't tell me.

THE COURT: I don't think so.

MR. GROSS: There was no stay.

MS. MANGONES: Well, this is a court of

equity, in addition, your Honor, and I'd like to bring up the matter of unconscionability that the fine is set at the amount of the judgment.

THE COURT: You have a right to go into the Civil Court to set aside that fine. First on the ground that the bankrupt was not served. If it's your position that the bankrupt wasn't served with the original subpoena, you have a right to attack the validity of that original order. I don't know whether that was done by Mr. Belvedere or by Mr. Fleischer.

MS. MANGONES: I suppose it was, wasn't it, Mr. Gross? Was it resolved?

MR. GROSS: I couldn't say.

THE COURT: Let me hear Mr. Gross.

MS. MANGONES: Why don't you, and then we'll come back.

THE COURT: Yes, let me hear Mr. Gross. I'm just giving you some of my thoughts in the matter based upon some research that I did in another matter some years ago.

MR. GROSS: The procedure was the usual procedure. An attempt was made to serve him by registered mail, which the CPLR authorized, and

they wouldn't accept service.

THE COURT: You mean the service of the subpoena?

MR. GROSS: The subpoena, yes, but they wouldn't accept service, and we ultimately had to give it to a process server, who in this case against him served it by leaving it with his wife and mailing him a copy.

There was no compliance with that subpoena. Then an order to show cause --

THE COURT: Excuse me a moment.

Mr. Guariglia, I must admonish you not to make any gestures. You have a lawyer here who is very, very competently representing you, and I must admonish you to control yourself because this is a proceeding that is brought, and I'm hearing Mr. Gross now.

MR. GROSS: An attempt was made to serve one order to show cause. That was unsuccessful. Thereafter another order to show cause was served. There was a --

THE COURT: To punish for contempt?

MR. GROSS: To punish for contempt. There was no appearance, and a bailable attachment, of

which a copy is before the Court, was issued. I notified the defendant by mail and also -- and the second time I sent him a photostat of the bailable attachment. He thereupon communicated with me and had a lawyer by the name of Mr. Belvedere get in touch with me.

I then discussed the question of giving him an opportunity to purge himself of contempt.

He did come and answer questions with the understanding that I would not let him sign it in my office but I would send it to his attorney, to Mr. Belvedere, and have him sign it in the presence of Mr. Belvedere, and then return it, because I did not want to have anything on there because his lawyer could not attend.

Mr. Belvedere -- and this is what upset the Civil Court judge as -- when the question came as to whether he had purged himself of contempt: He held the typed examination from February until April and sent it back to me the day before the last day for filing specifications of objection. It was this conduct that the Court felt that --

THE COURT: Filing specifications of objection --

MR. GROSS: In the Bankruptcy Court, yes. And I argued that there might have been information in there which might well have constituted a valid specification of objection. By holding this from February, despite three or four demands to return it, and returning it -- mailing it the day, so that I would get it on the first day when it would have been too late, or I'd have to make an application to open, the Court felt that it was justified in not -- in determining that he had not purged himself of the contempt, and the contempt -- there was no doubt as to that.

Now, of course I lift the veil on the proceedings of the Civil Court, but your Honor is not sitting as a justice of the Appellate Term. As a justice of the Appellate Term you would have ample right to review the discretion of the Civil Court judge, but I respectfully submit, and I'd like to rest my case simply on the fact that until we can promote your Honor to the Appellate Term -- At any rate, it's outside the ambit --

THE COURT: Off the record.

(Discussion off the record.)

MR. GROSS: On this particular issue of

discretion in fact, I respectfully submit that on decisions of the federal courts and the state courts, it is outside the court's jurisdiction, and I'll rest on simply that, so whether the order is right, wrong or indifferent, I think it's right, and I think it would be sustained if it was directly attacked, but I believe this is a collateral attack and there are other avenues of relief which Miss Mangones could explore.

In fact, I do wish they would explore the most fruitful one and would sit down and talk about this.

MS. MANGONES: Well, off the record.

(Discussion off the record)

MS. MANGONES: What we had in mind was with this court having taken jurisdiction, it would be superior jurisdiction to the Civil Court, to the State Court.

THE COURT: When you're talking about taking jurisdiction, there must be some affirmative steps taken by the bankruptcy, either a stay order or a proceeding brought on an order to show cause why the motion to punish, or the order to punish for contempt is improper.

So that I don't think -- there isn't an automatic stay in the filing of a petition in bankruptcy. There may very well be one under the new rules, but there isn't under the present posture of the law.

I'll give you an opportunity, if you wish, to submit a memorandum, and give Mr. Gross an opportunity to reply to it.

MS. MANGONES: Your Honor, I appreciate --

THE COURT: Let's take a five-minute recess, and let me get the decision that I wrote on this subject. I read the cases. I think I read all the cases.

(Recess)

(The Court read the decision in the West Hempstead case in open court.)

THE COURT: Miss Mangones, If you wish, I'll give you an opportunity to submit a memorandum to me on the question of law, because I think it's a pure question of law. I think it's a pure question of law under the cases cited by Mr. Gross.

MS. MANGONES: As I said before, I don't have any quarrel with the law. I read the cases.

THE COURT: Am I not bound by it then?

MS. MANGONES: I think you are. If you --

THE COURT: I think I --

MS. MANGONES: I'd like to distinguish this case on the facts, you see, and the --

THE COURT: The fact that he was examined?

MS. MANGONES: The fact that he was examined.

THE COURT: What about Mr. Gross's argument that the examination was never returned until the day before the last day to file specifications of objection to discharge? Why did the bankrupt -- why did he hold it?

MS. MANGONES: This is Mr. Belvedere.

THE COURT: Or whoever.

MS. MANGONES: Whoever held it. Well, it is still timely, even if it were a day ahead, is it not?

THE COURT: How could it possibly be? How could it possibly be? How could a creditor -- and I don't want to steal Mr. Gross's thunder -- how can a creditor who receives the examination the day before the last day to file specifications possibly get the specifications -- prepare specifications or even ask for an extension of time?

MS. MANGONES: Well, I suppose that the only way that we could solve that problem is to have

Mr. Belvedere come and explain what on earth happened. Mr. Belvedere, incidentally, has told me that he would be willing to testify in this case.

THE COURT: May I make this suggestion to you, Miss Mangones: My suggestion is that you go into the Civil Court to move to vacate or set aside this order fining the bankrupt. I think that that's the basis for this proceeding. It now stands as a valid order of the Civil Court. I think that your remedy may very well be there, to vacate and set that aside. But that's up to you. I'm not shirking my burden here, but I don't think that there's a question of fact. There's an order, signed by a judge of the Civil Court, holding the bankrupt in contempt and fining him a specific amount of money.

MS. MANGONES: Even though he did subject himself to --

THE COURT: I don't know what impelled the Civil Court judge to do it. If what you say is so, and he did subject himself to the examination, why was he fined in the Civil Court? Why wasn't that taken into consideration there?

MS. MANGONES: I have no idea, your Honor.

THE COURT: Neither have I. But there's a valid, subsisting order of a court of record of the State of New York that is facing me. I think the cases that I cited in the decision that I read to you, in this circuit anyway, don't permit me to vacate or set aside that judgment or that order of contempt.

Now, if you say that I have the power to do it, I'll let you convince me. I'll be very, very happy to relieve this bankrupt of this terrible onus, because I realize that the petition he filed was to relieve himself. I don't know what his obligations were offhand.

Yes, the Community National Bank is among his largest creditors, and he owes $14,579 to general unsecured creditors. His other large creditor was the Oakville Homes, Inc., promissory note for $4750. There are substantial tax claims.

MS. MANGONES: What was the total indebtedness, may I ask?

THE COURT: He owes $6200 on tax claims.

Let me look it up. Off the record.

(Discussion off the record.)

THE COURT: Taxes due the United States,

$1098.26, taxes due the State of New York, $3962.36 -- Off the record.

(Discussion off the record.)

MS. MANGONES: There was this litigation. The fact is that schedules had been filed, and this was subsequent.

THE COURT: That's exactly what happened. As a matter of fact, the order in the Hempstead case, Judge Thompson had not yet signed the order to punish for contempt.

MS. MANGONES: It's a premature thing, yes.

THE COURT: They argued that it was premature, and I said -- Off the record.

(Discussion off the record)

MS. MANGONES: We could argue the matter of waiver and whether or not you would be bound.

THE COURT: Waiver of what?

MS. MANGONES: If an examination was in fact taken, isn't there a waiver?

THE COURT: Isn't that a question for the judge who considered that in the original application? Of course, that's an argument that should have been made there. But you have the further complication, unfortunately for the bankrupt, that the

examination was never returned.

MS. MANGONES: But it was returned.

THE COURT: It wasn't returned until the eleventh hour. That may have convinced the judge who signed that. Perhaps you can convince him that the creditor could have come in and submitted an ex parte order to me extending the time.

I don't know what impelled the judge in that court to fix this punishment. Perhaps, again I say, you may have more success in convincing the court in the Civil Court that it erred in punishing this debtor. Your extenuating circumstances I think are for that court, not this one.

MS. MANGONES: I take it you're going to deny my motion.

THE COURT: I'm not going to -- No, I'll reserve decision on your motion.

MS. MANGONES: I see.

THE COURT: I'll reserve decision on your motion, and if you wish to submit a memorandum, I'll give you an opportunity to submit any memorandum that you wish on the question of waiver, on the question of civil or criminal contempt, or any question you wish me to consider.

MS. MANGONES: Fine.

THE COURT: If you wish -- On the other hand, if you wish me to give you sufficient time to go in to the Civil Court, I'll do that, too.

MS. MANGONES: I think I'd like some time to think this thing over.

THE COURT: Surely.

MS. MANGONES: And get in touch with Mr. Belvedere again.

THE COURT: May I say this, Miss Mangones, if you don't submit a memorandum to me, I will consider that as your acquiescence in the state of the law as I have outlined it to you here -- what my understanding of the state of the law is. There may be others who disagree with me. But I think that although I didn't dictate the decision in the record, I would attach it to any decision that I would write here, and I will say that the facts in this case are parallel to those in the West Hempstead case in which I cited all of the cases on the question of my authority to look behind a state court decision on this question.

MS. MANGONES: Yes.

THE COURT: If you can convince me to the

contrary, I'll be delighted to read anything that you might write.

MS. MANGONES: I see.

THE COURT: In other words, you wish some time to make your motion in the Civil Court, is that it?

MS. MANGONES: Yes.

THE COURT: How much time do you want for the memorandum? A month? Six weeks? Two months?

MS. MANGONES: Well, may we have two months?

THE COURT: I'll give you as much time as you want, and perhaps you can then go in there and convince them that they were wrong.

MS. MANGONES: O.K.

THE COURT: The motion was argued, and I will give you until November -- the bankrupt is given until November 15th to serve a memorandum on attorney for Community.

And how much time do you want to reply?

MR. GROSS: One week.

THE COURT: All right, November 22nd to reply. I don't want your memorandum until you serve it on Mr. Gross. I want all papers -- and if you want to answer his by letter or something

like that, or all papers in by the 22nd.

MS. MANGONES: That's fine.

THE COURT: All papers in by the 22nd.

MS. MANGONES: Now, if I don't submit the memo, it would be that I accede to your --

THE COURT: You don't accede, you protest vigorously.

MR. GROSS: Just write a letter with a copy to me.

THE COURT: Yes, that's right. Just write a letter to me and the chances are I will then deny your application based upon the discussion we've had on the record and on the cases I cited in the West Hempstead case.

All papers by November 22nd.

RESTRAINING ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

IN THE MATTER OF ALPHONSE GUARIGLIA, : IN BANKRUPTCY

Bankrupt, : No. 73 B 141

-against- :

COMMUNITY NATIONAL BANK AND TRUST COMPANY, :

Creditor. :

----------X

The Application of the Bankrupt herein for a restraining order having come on regularly for hearing before the undersigned Bankruptcy Judge pursuant to an Order to Show Cause issued by this court, and applicant appearing by THE LEGAL AID SOCIETY, JOAN MANGONES, ESQ., his attorney, and Respondent appearing by REUBEN E. GROSS, ESQ., its attorney, and no appearance having been made by the Sheriff of the City of New York, and evidence, oral and documentary, having been adduced and the matter having been argued and submitted and good cause appearing therefor,

IT IS HEREBY ORDERED, that Respondent Community National Bank and Trust Company, its agents and employees, be enjoined, restrained and forever barred from requiring the Bankrupt, ALPHONSE GUARIGLIA, to comply with an Order of the Honorable Jerome Otis Ellis, entered on June 19, 1973, in the Civil Court of the City of New York, County of Richmond, in the action entitled "In the Matter of Community National Bank

and Trust Company, Judgment Creditor vs. Alphonse Guariglia et ano, Judgment Debtor", Index No. 375/69, to wit: Order Imposing Fine for Contempt or otherwise attempting to collect said debt.

IT IS FURTHER ORDERED, that the Sheriff of the City of New York take no action by way of levy of any writs in the above-described action.

IT IS FURTHER ORDERED that the Sheriff of the City of New York take no action by way of arresting the Bankrupt in the above-described action.

IT IS FURTHER ORDERED, that the Sheriff of the City of New York take no action by way of committing the Bankrupt to civil jail of said city nor hold him in close custody therein.

Dated: Brooklyn, New York
February 27, 1974

S/ Manuel J. Price
BANKRUPTCY JUDGE

BANKRUPTCY COURT'S DECISION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

In the Matter of :

ALPHONSE GUARIGLIA, :

Bankrupt, : In Bankruptcy

- against - :

COMMUNITY NATIONAL BANK AND TRUST COMPANY, : No. 73 B 141

Creditor. :

----------x

The Legal Aid Society,
By JOAN MANGONES, Esq.,
of Counsel, for the
Bankrupt, for the motion.

REUBEN E. GROSS, Esq.,
Attorney for the Creditor,
in opposition.

The bankrupt has moved to restrain and enjoin Community National Bank and Trust Company (the Bank), one of his creditors, from requiring him to comply with an order of the Hon. James Otis Ellis, a judge of the Civil Court of the City of New York, dated June 19, 1973, adjudging him in contempt and fining him $4,805.

The following is a short resumé of the events which led up to the making of this motion:

The bank obtained a judgment against the bankrupt and his wife in an action which it had commenced against them in 1969. On September 15, 1972 its attorney, Reuben E. Gross, Esq., issued information subpoenas requiring them to answer interrogatories concerning their assets, which he attempted to serve by certified mail. The bankrupt refused to accept service in this way so a process server was engaged who served the bankrupt by leaving a copy of the subpoena for him with his wife and sending him a copy by certified mail as provided by Section 308(2) of the NYCPLR. Neither the bankrupt nor his wife responded, so Mr. Gross applied to the Civil Court for an order to show cause to punish for contempt. This, too, was given to a process server for service on the bankrupt, but he was unable to do so.

A second order to show cause was obtained on November 2[illegible], 1972, which was returnable on December 22, 1972. This order to show cause was served on the bankrupt, who did not appear on the return date. On December 29, 1972 a bailable attachment was issued by the Civil Court providing for his arrest.

Mr. Gross advised the bankrupt by letter that the bailable attachment had been issued and suggested that he communicate with him. At this point the bankrupt consulted an attorney, Joseph H. Belvedere, Esq., who communicated with Mr. Gross and arranged for the bankrupt and his wife to be examined as to their assets at Mr. Gross's office on February 15, 1973. It was agreed between Mr. Gross and Mr. Belvedere that, since Mr. Belvedere would not be present, the examination was not to be signed until after it had been forwarded to him for his perusal.

In the meantime, Mr. Belvedere was retained by the bankrupt to prepare and file a petition in bankruptcy for him. The petition was executed on January 10, 1973 but was not filed until February 7, 1973. The case was referred to me. I scheduled the first meeting of creditors for February 22, 1973, and notice thereof was sent to all creditors, including the bank, on February 9, 1973. The notice provided

that April 11, 1973 was fixed as the last day to file specifications of objections to the bankrupt's discharge and to file applications to determine the dischargeability of debts claimed to be non-dischargeable pursuant to clauses (2), (4) or (8) of Section 17a of the Bankruptcy Act, 11 U.S.C. §35a (2), (4) or (8).

On February 15, 1973 the bankrupt and his wife appeared at Mr. Gross's office and were examined as to their assets. The transcript was then forwarded to Mr. Belvedere for his examination and for the bankrupt's signature. For some reason, Mr. Belvedere did not return it promptly, and Mr. Gross wrote to him requesting its return properly signed. It was signed by the bankrupt on April 9, 1973 and returned on April 10, 1973, the day before the last day fixed in the first meeting notice for filing specifications of objection to the bankrupt's discharge and applications to declare debts non-dischargeable.

In the interim, the first meeting of creditors was held on February 22, 1973; no creditors appeared; the bankrupt was examined by me; I appointed a trustee and closed the first meeting. Thereafter, on May 22, 1973, the bankrupt made a motion to amend Schedule A-3 of the

petition in bankruptcy to add Bank Americard as a creditor as it had been inadvertently left out. I granted the motion and I required him to extend the time to file specifications of objection to discharge and applications to declare debts non-dischargeable to July 16, 1973.

After receiving the signed transcript of the bankrupt's examination from Mr. Belvedere, Mr. Gross moved in the Civil Court, on May 14, 1973, for an order adjudging the bankrupt in contempt and fining him the amount of the judgment, $4755. The bankrupt opposed the motion. He was represented by Abraham Fleishmann, Esq., an associate of Mr. Belvedere, who submitted affidavits by the bankrupt and Mr. Belvedere in opposition. However, on June 19, 1973, Judge Jerome Otis Ellis found the bankrupt in contempt; fined him the amount of the judgment, $4755 plus $50 costs, and directed that the sum of $4805 be paid to the bank in $20 weekly installments at Mr. Gross's office. It also provided that if the bankrupt failed to make any installment payment the entire balance became due and an order for his commitment might issue, on three days notice to him, directed to the sheriff providing for his arrest and commitment in the county jail until the fine was paid.

At first blush, it would appear that this is the situation in which a bankrupt ordinarily finds himself when he has failed to obey an order of a state court and has been held in contempt. The cases and authorities are clear that this court will not interfere with proceedings to punish a bankrupt for a contempt of court committed prior to the filing of the petition in bankruptcy. In Re Koronsky, 170 F.719; In Re Hall, 170 F.721; In Re Spagat, 4 F.Supp.926; In Re Bell, 53 F.Supp.993; In Re McRoberts, 17 F.Supp.82; In Re Thomashefsky, 51 F.2d 1040; Remington on Bankruptcy, Volume 2, Secs. 561-562, p.22 et seq.; Collier on Bankruptcy, Vol. 1A, ¶9.02, p.1085.

As a matter of fact, I expressed such an opinion on the argument of this motion, and I referred to the case of In Re West Hempstead Nursery and Garden Center, Inc., 68 B. 879, decided by me on January 31, 1969, in which I refused to stay a creditor from going forward with proceedings to punish an officer of the bankrupt for contempt of a state court committed prior to the filing of an involuntary petition in bankruptcy against it. This case was the subject of litigation in the New York state courts, which held that the fine imposed for the contempt was proper. Liberty

Distributors, Inc. v. West Hempstead Nursery and Garden Center, Inc., 58 Misc.2d 240, 294 N.Y.S.2d 924, affd., 62 Misc.2d 905, 309 N.Y.S. 2d 956.

However, reflection and research have convinced me that the cases and authorities cited above are not applicable to the case at bar. In all of those cases the judgment creditors were frustrated in their attempts to examine the bankrupts as to their assets. It was on this basis that they were punished for contempt, and the bankruptcy court refused to interfere with the vindication of the dignity of the state courts. Here, however, the bankrupt appeared for examination on February 15, 1973, pursuant to the agreement made between his attorney and the bank's attorney. This examination took place after the bailable attachment had issued by the civil court and after the bankrupt had filed his petition here. Both the bankrupt and his wife were evidently examined fully and completely as to their property and any disposition they had made of their assets, yet the motion to adjudge the bankrupt in contempt was made and granted, requiring him to pay the bank $4805 on pain of imprisonment.

The bank contends that this court may not look behind

the judgment of the Civil Court to punish the bankrupt for contempt and that its motion and the fine imposed on the bankrupt were proper by reason of the fact that the signed transcript of the bankrupt's examination was not returned until April 11, 1973, the last day fixed in the first meeting notice to file specifications of objection to discharge etc. It argues that it was prejudiced by the belated return because it did not have sufficient time to prepare and file the necessary papers in this court to object to the discharge or to make application to declare its debt non-dischargeable if it had wished to do so.

I find the latter argument without merit. The bankrupt had been examined by the bank's attorney on February 15, 1973. If that examination had given it any basis for filing specifications of objection to his discharge or for contending that its debt was non-dischargeable, it could have filed the necessary papers in this court prior to its receiving the return of the signed transcript. There is nothing in Section 14c or 17 of the Bankruptcy Act, 11 U.S.C. §32c or §35, which requires that the basis for filing specifications etc., must be a written, signed examination. If it had grounds for objecting to his discharge etc., and

it felt it needed more time to prepare the papers, an ex parte application could have been made to me for an extension of time to file. The attorney for the bank is familiar with the fact that applications of this kind are granted almost on a pro forma basis. However, even that was not necessary because I required the bankrupt, as a condition to permitting him to amend his schedules, to extend the time to file specifications of objection to his discharge and applications to declare debts non-dischargeable to July 16, 1973, and I signed an order to that effect on June 7, 1973.

The examination evidently disclosed no grounds for the denial of his discharge or for the finding that the bank's debt was non-dischargeable, because it filed no such application even though it had until July 16, 1973, more than three months after its attorney received the signed transcript from the bankrupt, to do so. Instead, it used the motion to punish the bankrupt for contempt and to fine him the amount of the judgment as a means of circumventing the discharge of its obligation.

So far as the first argument is concerned, this court, as a court of equity, has never hesitated to use its

power to grant relief to a bankrupt who is the subject of oppressive action on the part of a state court where the debt which is the basis for the state court action is dischargeable. The following quotation from Collier on Bankruptcy, Volume 1, ¶2.09, page 173, points this up.

> "The bankruptcy court, therefore, is a court of equity. It will look through the form to the substance of any particular transaction and may contrive new remedies where those at law are inadequate." (Emphasis added.)

In the case of Pepper v. Litton, 308 U.S.295, the Supreme Court held that the bankruptcy court had the equitable power to examine into a judgment entered against the bankrupt even though the trustee in bankruptcy had been defeated in a state court action brought by him to set it aside. Justice Douglas analyzed the basis for the bankruptcy court's equitable powers and said the following, at page 304:

> "The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will

not prevent substantial justice from being done." (Emphasis mine.)

In the case of Local Loan Company v. Hunt, 292 U.S. 234, the bankruptcy court had enjoined Local Loan, one of the bankrupt's creditors whose debt had been discharged, from proceeding with an action in the Chicago Municipal Court against his employer to enforce a wage assignment which he had executed at the time he borrowed money from Local Loan. The action was stayed even though it was the creditor's contention that the bankruptcy court was without jurisdiction to entertain a proceeding to enjoin the state court action, since it was bound by the decision of the highest court of the State of Illinois, which had held that an assignment of future wages constituted an enforceable lien. The decision of the bankruptcy court was affirmed by the Court of Appeals for the Seventh Circuit, and the Supreme Court granted certiorari.

That court found that the bankruptcy court had the authority to entertain the application to stay the state court action but that it should not be exercised except under unusual circumstances. Mr. Justice Sutherland, writing for the unanimous court, then outlined the reasons

why the bankruptcy court had properly exercised its authority, at page 241:

> "It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist. So far as appears, the municipal court was competent to deal with the case. It is true that respondent [the bankrupt] was not a party to that litigation; but undoubtedly it was open to him to intervene and submit to that court the question as to the effect upon the subject matter of the action of the bankruptcy decrees. And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which respondent now seeks in equity. Nevertheless, other considerations aside, it is clear that the legal remedy thus afforded would be inadequate to meet the requirements of justice. As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined." (Emphasis mine.)

Are the circumstances of the case at bar so unusual as to warrant the exercise of this court's equitable power

to stay the order punishing the bankrupt for contempt? They are at least as unusual as those in Local Loan Company v. Hunt, supra, where the answer was in the affirmative. Here, the bankrupt could, of course, apply to the Civil Court to be relieved of his contempt. However, what would be his chance of success? That court had already rejected his defense and had fined him almost $5,000 for the alleged "contempt." His time to appeal from that judgment has long since expired, and besides, New York State law, as enunciated in Liberty Distributors, Inc. v. West Hempstead Nursery and Garden Center, Inc., cited above, is against him. He is faced with the alternative of either making the weekly payments or being committed to the civil jail in spite of the fact that the basis for the contempt, his failure to appear for examination, was undermined by his examination on February 15, 1973. This legal remedy is clearly inadequate "to meet the requirements of justice." In Local Loan Company v. Hunt, supra, the bankrupt at least had the alternative of intervening in the Municipal Court action against his employer and then taking a series of appeals. The bankrupt here has no such choice. His time to appeal has expired, and if this court does not exercise its

equitable power he does not have any other place to look for relief.

It is clear from the foregoing that this court should exercise the equitable power which it has to relieve the bankrupt from complying with the order of the Civil Court of the City of New York, County of Richmond, dated June 19, 1973, adjudging him in contempt. His motion to restrain and enjoin the Community National Bank and Trust Company from requiring him to comply with the said order is granted.

Settle order on notice within five days from the date hereof.

Dated: Brooklyn, New York,

February 28th 1974.

Bankruptcy Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of	:	
ALPHONSE GUARIGLIA,	:	Docket No. 73-B-141
Bankrupt-Appellee,	:	NOTICE OF APPEAL
-against-	:	
COMMUNITY NATIONAL BANK AND TRUST COMPANY,	:	
Creditor-Appellant.	:	

S I R S:

PLEASE TAKE NOTICE that the above-named creditor-appellant, COMMUNITY NATIONAL BANK AND TRUST COMPANY, hereby appeals to the United States Court of Appeals for the Second Circuit from an order made by Hon. John R. Bartels, made and entered in this action on or about September 30, 1974, which order affirmed an order of a bankruptcy judge restraining the creditor-appellant from proceeding to compel the bankrupt to comply with a contempt order of a state court.

Dated: October 21, 1974

REUBEN E. GROSS, ESQ.
Attorney for Creditor-Appellant
30 Bay Street
Staten Island, New York 10301
447-8006

TO: CLERK OF U. S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KALMAN FINKEL, ESQ., JOAN MANGONES, ESQ., of Counsel
The Legal Aid Society
267 West 17th Street
New York, New York 10011

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of Dec. , 1974 deponent served the within Appendix upon Kalman Finkel, Esq. The Legal Aid Society

attorney(s) for Appellee

in this action, at 267 West 17 St. New York, N.Y. 10011

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
6 day of Dec. 1974

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976